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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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NO. PD-0556-20

IN THE TEXAS COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
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PHI VAN DO
Respondent (Appellant in the Court of Appeals)
v.
THE STATE OF TEXAS
Petitioner (Appellee in the Court of Appeals)

On Review from No. 14-18-00600-CR
in which the Fourteenth District Court of Appeals
considered Cause Number 2130699
from County Criminal Court at Law No. 10
Harris County, Texas
Hon. Dan Spjut, Judge Presiding

RESPONDENT'S MOTION FOR REHEARING

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Secondary Authority

Rules

THE RIGHT TO A JURY DETERMINATION OF EVERY ELEMENT OF AN OFFENSE

The Majority correctly identifies the error in this case. Speaking of the offense of Class-A-misdemeanor DWI, the Majority says:

> Assuming the parties are correct that [the] 0.15 allegation is an element, we conclude that the error would be the denial of the right to a jury determination of that element.[1]

Relevant Opinions of the United States Supreme Court

The right to a jury determination of every element of an offense is constitutional in nature. We are talking, of course, about the United States Constitution. The federal constitutional rights in play here are the Sixth-Amendment right to a jury trial and the Fourteenth-Amendment right to due process. The Supreme Court made this clear just five years ago in *Hurst v. Florida*:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt.[2]

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[1] *Do v. State,* No. PD-0556-20, 2021 WL 4448956, at *1 (Tex. Crim. App. Sep. 29, 2021) (hereinafter "Majority Opinion"). This error is the one about which Mr. Do complained in his fourth issue in the Fourteenth Court of Appeals. As the Majority Opinion stated, Mr. Do "argued that the trial court denied him his federal constitutional right to a jury determination of the allegation." Majority Opinion at *3.

[2] *Hurst v. Florida,* 577 U.S. 92, 97, 136 S.Ct. 616, 621, 193 L.Ed.2d 504 (2016) (emphasis added) (opinion by Justice Sonia Sotomayor). Even more recently, the Supreme Court reiterated this idea in *United States v. Haymond,* ___ U.S. ___, 139 S.Ct. 2369, 2373, 204 L.Ed.2d 897 (2019) ("Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government."). The opinion was authored by Justice Neil Gorsuch.)

As authority for its statement, the Supreme Court cited *Alleyne v. United States* – a 2013 opinion saying essentially the same thing:

> The Sixth Amendment provides that those "accused" of a "crime" have the right to a trial "by an impartial jury." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt.[3]

The *Alleyne* Court relied on two earlier Supreme-Court cases. The first was *United States v. Gaudin* from 1995. In *Gaudin,* Justice Antonin Scalia wrote the opinion for a unanimous Court and declared:

> The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without "due process of law"; and the Sixth, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.[4]

The second case cited by *Alleyne* was the well-known case of *In re Winship.* The *Winship* case is the granddaddy of this line of cases.[5] It is an oft-cited opinion written by Justice William Brennan who declared:

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause

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[3] *Alleyne v. United States,* 570 U.S. 99, 104, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013) (emphasis added) (opinion by Justice Clarence Thomas).

[4] *United States v. Gaudin*, 515 U.S. 506, 509-10, 115 S.Ct. 2310, 2313, 132 L.Ed.2d 44 (1995) (emphasis added). The Fourteenth Amendment (rather than the Fifth Amendment) is implicated in a state prosecution. *See Sullivan v. Louisiana,* 508 U.S. 275, 278, 113 S.Ct. 2078, 2080-81, 124 L.Ed.2d 182 (1993) ("This beyond-a-reasonable-doubt requirement, which was adhered to by virtually all common-law jurisdictions, applies in state as well as federal proceedings.").

[5] *See* discussion of the "first line of cases" on pages 17 and 18 of this motion.

> protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime of which he is charged.[6]

In addition to *Hurst, Alleyne, Gaudin,* and *Winship,* we have *Apprendi v. New Jersey* – a celebrated 2000 opinion by Justice John Paul Stevens. *Apprendi* put things this way:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *United States v. Gaudin,* 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); see also *Sullivan v. Louisiana,* 508 U.S. 275, 278, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *Winship,* 397 U.S., at 364, 90 S.Ct. 1068 ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").[7]

The Foregoing Principle has been Embedded in Texas Statutory Law

Article 38.03 of the Texas Code of Criminal Procedure is essentially an adoption of the principles set out in the Supreme-Court cases described above. The statute says;

> All persons are presumed innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.[8]

[6] *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970) (emphasis added).
[7] *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S.Ct. 2348, 2355-56, 147 L.Ed.2d 435 (2000) (emphasis added)(internal footnote omitted).
[8] Tex. Code Crim. Proc. art. 38.03 (emphasis added).

The Texas Penal Code expresses the same idea in nearly identical language.[9]

This Court has followed the Texas Statutes and the United States Supreme Court in the Past

A decade ago, this Court decided *Miles v. State* and said:

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[10]

And while *Miles* did not explicitly say so, the proof must be made to the jury if the defendant has not waived one. This is the unmistakable teaching of the United States Supreme Court in *Sullivan v. Louisiana*:

> The right ["to a speedy and public trial, by an impartial jury"] includes, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of "guilty." Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements.[11]

[9] Tex. Penal Code § 2.01 ("All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.") (emphasis added).

[10] *Miles v. State,* 357 S.W.3d 629, 631 (Tex. Crim. App. 2011) (citing *In re Winship*).

[11] *Sullivan v. Louisiana,* 508 U.S. at 277-78 (emphasis added) (internal citations omitted). The *Sullivan* opinion was authored by Justice Antonin Scalia.

The Foregoing Authorities establish an Absolute Prohibition

As mentioned at the outset of this motion, the Majority Opinion correctly identifies the error in this case. That error was the denial of Mr. Do's right to have a jury determine the 0.15 element of Class-A-misdemeanor DWI. To the extent that the Majority Opinion correctly identifies the error, the authorities cited above have been followed.[12] But there is still a problem. The problem is that the above-cited authorities all speak in terms of absolute prohibitions. And the Majority does not treat the error in this case as an absolute prohibition.

The Sixth Amendment and the Due Process Clause require "that each element of a crime be proved to a jury."[13] A criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged."[14] Without such a jury determination, an accused person is protected against conviction.[15] Criminal convictions must rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged.[16]

If defendants are protected from conviction if all elements of an offense are not proven to a jury, then how can Mr. Do's conviction stand? The facts are not in dispute.

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[12] Those authorities, of course, are: (1) the Supreme Court cases of *Hurst, Alleyne, Guadin, Winship, Apprendi,* and *Sullivan*; (2) Article 38.03 of the Code of Criminal Procedure and Section 2.01 of the Penal Code; and (3) this Court's own opinion in *Miles*.
[13] *Hurst v. Florida,* 577 U.S. at 97.
[14] *Apprendi v. New Jersey,* 530 U.S. at 477.
[15] *Id.*
[16] *United States v. Gaudin*, 515 U.S. at 509-10.

Each element of Class-A-misdemeanor DWI was not proven to the jury. Yet somehow, the Majority keeps Mr. Do's conviction for that offense in place. This is a problem. The result violates *Hurst*. It contravenes *Apprendi*. It disregards *Guadin*. And it renders wholly illusory Mr. Do's constitutional rights to a jury trial and to due process.

So we circle back to the question of how the Majority reaches the conclusion that Mr. Do's conviction can stand. The answer is that the Majority decides to conduct a harm analysis. But, respectfully, this is a mistake. There should be no harm examination when it comes to an absolute prohibition. This Court has said so.

Consider the 1995 case of *Stine v. State* out of Bosque County.[17] In *Stine,* the complaining witness could not appear in court in the county seat of Meridian because he was hospitalized in the city of Clifton. After a day's worth of testimony at the courthouse in Meridian, the trial resumed at the hospital in nearby Clifton. The complaining witness and a doctor testified in Clifton. Then the trial resumed back in Meridian. Nobody objected to the portion of the trial that took place in Clifton. The defendant was ultimately convicted.

On appeal, the defendant argued that the judge was unauthorized to conduct any part of the trial in Clifton. The defendant relied on Article V, Section 7 of the Texas Constitution. He argued that Section 7 absolutely prohibits district judges from holding

[17] *Stine v. State,* 908 S.W.2d 429 (Tex. Crim. App. 1995).

court at any place other than the county seat.[18] This Court found that the constitutional provision did indeed create an absolute prohibition.[19] Accordingly, the issue could be raised for the first time on appeal.[20] However, this was not the end of this Court's analysis. The State argued the error was harmless. But this Court declined to conduct a harm analysis:

> The State argues that in the event that error occurred in the lower court, the conviction of appellant should be affirmed because the error was harmless. Under Tex. R. App. Pro. 81(b)(2), an appellate court must reverse the proceedings of the lower court, unless the appellate court finds, beyond a reasonable doubt, that the error made no contribution to the conviction or to the punishment. Because the language of art. V, § 7 is clear and unambiguous, we interpret it to be mandatory, non-waivable and thus no harm analysis need be done. *Sodipo v. State,* 815 S.W.2d 551, 554 (Tex. Crim. App. 1991).[21]

The case cited as authority in the *Stine* opinion – *Sodipo v. State* – concerned Article 28.10 of the Code of Criminal Procedure. The statute authorizes the amendment of a charging instrument "at any time before the date the trial on the merits commences."[22] But in *Sodipo,* the State was permitted to amend an indictment on the day of trial. This Court held that the State should not have been permitted to do so.[23] And, relevant to our current discussion, this Court said:

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[18] Tex. Const. art. V, § 7 ("The Court shall conduct its proceedings at the county seat of the county in which the case is pending, except as otherwise provided by law.").
[19] *Stine v. State,* 908 S.W.2d at 431.
[20] *Id.*
[21] *Id.* (emphasis added).
[22] Tex. Code Crim. Proc. art. 28.10 (emphasis added).
[23] *Sodipo v. State,* 815 S.W.2d 551, 556 (Tex. Crim. App. 1990).

> We conclude that in order to give effect to the full meaning and intent of Article 28.10, which is written with clarity and is not ambiguous, the error complained of in the instant case, i.e., that the State should not be permitted to amend a charging instrument on the day of trial prior to commencing trial on the merits over the defendant's objection, should not be subjected to a harm analysis.[24]

The situation in the present case is much the same. We are considering the guarantee emanating from the Sixth-Amendment right to a jury trial and the Fourteenth-Amendment right to due process. This guarantee requires that each element of a crime be proved to a jury beyond a reasonable doubt.[25] In the absence of such proof, persons are protected against conviction.[26] In other words, "no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt."[27] One can hardly say full effect is given to this guarantee if it can be eviscerated through harmless-error analysis.

In *Marin v. State,* this Court set out an important principle regarding the propriety of harmless-error analysis. Such analysis is appropriate "only when it does not threaten to undermine the very precepts which distinctly specify the fair operation of [our

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[24] *Id.* (emphasis added).
[25] *Hurst v. Florida,* 577 U.S. at 97.
[26] *Sullivan v. Louisiana,* 508 U.S. at 277-78 ("What the factfinder must determine to return a verdict of guilty is prescribed by the Due Process Clause. The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder "beyond a reasonable doubt" of the facts necessary to establish each of those elements.").
[27] Tex. Penal Code § 2.01 (emphasis added).

adjudication] system."[28] And these precepts include "fundamental rules of due process and due course of law."[29] This Court then added this sage statement:

> Otherwise, we may eventually come to believe that denying an accused even the assistance of counsel is harmless whenever the jury would almost certainly have convicted him in any event.[30]

Respectfully, the Majority's decision in the current case seems to move us another step toward the situation the *Marin* Court envisioned. In other words, the decision moves us toward a situation in which findings of harmlessness defeat fundamental principles of due process.

If proof to the jury of every element of an offense is lacking, there can be no conviction for that offense. This is the teaching of the United States Supreme Court. Thus, the Majority's decision to conduct a harm analysis seems questionable. Accordingly, a look at the Majority's rationale for conducting a harm analysis is in order.

The Rationale for the Majority's Harm Analysis

The Majority analyzes whether "the denial of [Mr. Do's] federal constitutional right to a jury trial on a single element of an offense" was harmless. In setting out its rationale for analyzing harm, the Majority first explains the concept of structural error:

[28] *Marin v. State,* 851 S.W.2d 275, 281 (Tex. Crim. App. 1993).
[29] *Id.*
[30] *Id.*

> If an error is "structural," it is exempt from a harm analysis. *See Schmutz v. State,* 440 S.W.3d 29, 35 (Tex. Crim. App. 2014). But only federal constitutional errors can be structural and most are not. *Id.*

The Majority then goes on to cite the 1999 U.S. Supreme Court case of *Neder v. State.*[31] The Majority declares:

> And in *Neder v. United States,* the Supreme Court held that the denial of the federal constitutional right to a jury trial on a single element of an offense is not structural error.[32]

The Majority then proceeds to conduct a harm analysis.

The Standard used by the Majority in its Harm Analysis

The Majority sets out the standard to be used in its harm analysis as follows:

> For preserved constitutional error that is not structural, the correct standard of harm on direct appeal is, ordinarily, that the error is harmless if the court can determine "beyond a reasonable doubt that the error did not contribute to the conviction or punishment.[33] The Supreme Court has held that this harm standard applies to the omission of an "element" of the offense from the jury instructions in violation of the constitutional right to a jury trial. In *Neder,* the Court held that harmlessness is shown beyond a reasonable doubt when "an omitted element is supported by uncontroverted evidence . . . where [the] defendant did not, and apparently could not, bring forth facts contesting the omitted element.[34]

[31] *See Neder v. United States,* 527 U.S. 1, 8-15, 119 S.Ct. 1827, 1833-38, 144 L.Ed.2d 35 (1999).
[32] Majority Opinion at *9.
[33] Majority Opinion at *10.
[34] *Id.* (ellipsis and brackets in the original).

The Majority finds that under this standard, "any error in failing to submit the 0.15 allegation to the jury was harmless beyond a reasonable doubt."[35] Mr. Do does not agree with the Majority's finding, but that is not the basis for filing this motion for rehearing. The reason Mr. Do advances this motion is to ask this Court to revisit its decision to analyze harm in the first place.

Two Reasons the Error in this Case may actually be Structural

As mentioned above, the Majority concluded that the error in this case is not structural. Therefore, the Majority concludes that there necessarily has to be a harm analysis. For two separate reasons, this conclusion is open to question.

Reason One: This Court need not follow Neder v. United States

The key case on which the Majority relies for the proposition that the error is not structural in this case is *Neder v. United States.*[36] The *Neder* opinion is part of one of two lines of Supreme-Court opinions that are inconsistent with each other.

The first line of cases stands for the principle that no conviction can stand unless each element of the crime is proved to a jury.[37] This long line of cases has its genesis in 1970 in the case of *In re Winship.* The principle explicated in *Winship* was reiterated

[35] Majority Opinion at *11.
[36] *See* Majority Opinion at *9 ("And in *Neder v. United States,* the Supreme Court held that the denial of the federal constitutional right to a jury trial on a single element of an offense is not structural error."). The Majority cites to *Neder v. United States,* 527 U.S. at 8-15.
[37] This assumes, of course, that the defendant has not waived his right to a jury.

nine years later in *Jackson v. Virginia.*[38] And the Supreme Court restated – and sometimes expanded – the principal in 1993,[39] 1995,[40] 2000,[41] 2002,[42] 2004,[43] 2013,[44] 2016,[45] and 2019.[46] Portions of most of these opinions have been set out in the first part of this motion.

The second line of cases originated significantly later than the first line of cases. This second line of cases stands for the idea that the omission of an element to a jury is an error subject to a harm analysis. This line of cases is a short one. It began with *Johnson v. United States* – a 1997 opinion by Chief Justice William Rehnquist.[47] The leading case came two years later – *Neder v. United States,*[48] authored once again by Chief Justice Rehnquist. One more case followed – the 2006 opinion of *Washington v. Recueno* which was authored by Justice Clarence Thomas.[49] There have been no more such cases since then.

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[38] *See Jackson v. Virginia,* 443 U.S. 307, 316, 99 S.Ct. 2781, 81 L.Ed.2d 560 (1979) ("*Winship* presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of facts beyond a reasonable doubt of the existence of every element of the offense.")
[39] *Sullivan.*
[40] *Gaudin.*
[41] *Apprendi.*
[42] *Ring v. Arizona,* 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).
[43] *Blakely v. Washington,* 542 U.S. 296, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).
[44] *Alleyne.*
[45] *Hurst.*
[46] *Haymond.*
[47] *Johnson v. United States,* 520 U.S. 461, 469, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997).
[48] *Neder v. United States,* 527 U.S. at 1.
[49] *Washington v. Recueno,* 548 U.S. 212, 222, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

In *Neder,* the Supreme-Court majority held, "the omission of an element is an error that is subject to harmless error analysis."[50] This idea faced resistance from the get-go. And the resistance came from none other than Justice Scalia. He said this in his dissenting opinion:

> I believe that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged – which necessarily means his commission of *every* element of the crime charged – can never be harmless.[51]

Since *Recueno* in 2006, the Supreme Court has not produced another opinion asserting the principle set out in *Neder*. The Court had an opportunity to do so in the *Hurst* case in 2016. But the Court declined to "reach the State's assertion that any error was harmless."[52] The Court said state courts should decide whether errors are harmless.[53]

So is *Neder* still good law? It's a cert-worthy question.[54] About the most we can say about *Neder* is that this Court should not feel compelled to follow it.

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[50] *Neder v. United States,* 527 U.S. at 15.

[51] *Neder v. United States,* 527 U.S. at 30 (Scalia, J., dissenting) (italics in original). Justice Scalia then said "[t]he very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right." *Id.* at 34.

[52] *See Hurst v. Florida,* 577 U.S. at 609.

[53] *Id.* It is probably fair to say that the *Hurst* Court did not embrace *Neder*.

[54] In other words, the Supreme Court would be justified in entertaining this issue upon receiving a petition for a writ of certiorari.

Reason Two: Arguably, the Right to a Jury Trial is stronger under the Texas Constitution than under its Federal Counterpart

The right to a jury trial under the Texas Constitution is arguably stronger than the same right under our federal Constitution. If this is truly the case, it becomes more difficult to justify a harmless-error analysis in situations like the one in the current case. Judge Yeary touched on this concept very briefly in his dissenting opinion in this case.[55] But he expounded on this idea in great depth in his dissenting opinion in *Niles v. State,* writing:

> But now that the Court has (belatedly) accepted the SPA's invitation to reformulate the issue, the Appellant should at least be permitted to argue, on remand, that the jury charge did not simply violate the federal constitution—it violated the Texas Constitution as well. Indeed, he should even be allowed to claim, in supplemental briefing, that this charge error should not be subject to a harmless error analysis *at all,* under principles of our own constitution. Unlike the Sixth Amendment, Article I, Section 15, if the Texas Constitution proclaims that "[t]he right of trial by jury shall remain inviolate." There is ample room for the argument that the failure of the jury to render a verdict that passed on every element necessary to constitute the offense that is reflected in the judgment is "structural" error for state constitutional purposes, and not subject to a harm analysis at all.[56]

In a footnote,[57] Judge Yeary quoted from his concurring opinion in *Lake v. State*[58] as follows:

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[55] *See Do v. State,* No. PD-0556-20, 2021 WL 4448956, at *18 (Tex. Crim. App. Sep. 29, 2021) (Yeary, J., dissenting) (hereinafter "Yeary Dissent). Judge Yeary says the Majority errs in failing to regard the error as structural.

[56] *Niles v. State,* 555 S.W.3d 562, 577-78 & n.13 (Tex. Crim. App. 2018) (Yeary, J., dissenting).

[57] *Id.* at n. 13.

[58] *Lake v. State,* 532 S.W.3d 408, 419 (Tex. Crim. App. 2017) (Yeary, J., concurring).

> I am not inclined to straitjacket our construction of [the harmless error rule] as the plurality continues to do today, in derogation of this Court's authority to, for example, declare certain *state* constitutional violations to be immune to harm analysis.

Article I, Section 29 of our Constitution supports Judge Yeary's position:

> To guard against the transgressions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto, or to the following provisions shall be void.

So Section 15 says the right to a jury trial shall remain inviolate. And Section 29 says the provisions in our Texas Bill of Rights (which includes Section 15) "shall forever remain inviolate."[59] How much stronger must our Constitution's language be to communicate that that the right to a jury trial cannot be eviscerated? Using a harmless-error analysis here seems to encroach upon that right.

[59] To be inviolate means to not be violated or profaned. Merriam Webster's Collegiate Dictionary at 616 (1999).

CONCLUSION

Undersigned counsel knows that motions for rehearing are not granted very often. It's understandable. This Court is not too interested in making changes to the product of its hard work. But undersigned counsel also know this Court wants to get the law right. For several reasons, this case may be worth another look.

First, the Majority Opinion is based on a Supreme-Court case (*Neder*) that may not be the law anymore.

Second, the Majority Opinion runs contrary to a great deal of United-States-Supreme-Court precedent (*Winship, Jackson v. Virginia, Sullivan v. Louisiana, Gaudin, Apprendi, Ring v. Arizona, Blakely v. Washington, Alleyne, Hurst, Haymond*).

Third, the Majority Opinion does not follow two Texas statutes that absolutely prohibit convictions in the present circumstances (Code of Criminal Procedure, Article 38.03 and Penal Code, Section 2.01).

Fourth, the Majority Opinion does not consider our unique Texas Constitution and its inviolable Bill of Rights. And the Federal Constitution's guarantees under the Sixth Amendment (jury trial) and the Fourteenth Amendment (due process) have been discounted.

Fifth, the Majority Opinion does not consider this Court's opinions in *Stine* and *Sodipo* which would seem to compel a different result.

Sixth, the Majority Opinion was not unanimous; three judges dissented. There were two separate dissenting opinions.

PRAYER

Mr. Do prays that this Court grant this motion for rehearing and issue a new opinion affirming the Court of Appeals' judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 29, 2021, I provided this motion to the Harris County District Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rule of Appellate Procedure 9.5.

Additionally, I certify that on October 29, 2021, I provided this motion to the State Prosecuting Attorney via the EFILETEXAS.gov e-filing system. This service is required by Texas Rules of Appellate Procedure 68.11 and 70.3.

/s/ Ted Wood

TED WOOD
Assistant Public Defender
Attorney for Respondent

CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this motion contains 4,497 words. This word-count is calculated by the Microsoft Word program used to prepare this motion. The word-count does not include those portions of the brief exempted from the word-count requirement under Texas Rule of Appellate Procedure 9.4(i)(1). The number of words permitted for this type of computer-generated brief (a motion for rehearing in an appellate court) is 4,500. Tex. R. App. P. 9.4(i)(2)(D).

/s/ Ted Wood
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey Soule		information@spa.texas.gov	10/29/2021 10:40:46 AM	SENT